Supreme Court, U.S.
FILED
98 1864 MAY 19 1999
OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

RODNEY E. SLATER, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

GEORGE M. CHUZI
(Counsel of Record)
KALIJARVI, CHUZI & NEWMAN, P.C.
1730 K Street, N.W.
Suite 1011
Washington, DC 20006
(202) 331-9260
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4pp
f.o

QUESTIONS PRESENTED

1. Whether, in light of this Court's pending decision in *Cleveland v. Policy Management Systems Corp., et al.* (No. 97-1008), the court of appeals' holding that petitioner is not entitled to accommodation under the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, because she had claimed she was disabled and applied for disability benefits under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, should be reversed and remanded?

2. Whether, in light of this Court's pending decision in *Cleveland v. Policy Management Systems Corp., et al.* (No. 97-1008), the court of appeals' holding that petitioner is not "otherwise qualified for employement" under the Rehabilitation Act because of statements she made regarding her disability, should be reversed and remanded?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE COURT OF APPEALS' HOLDING THAT PETITIONER IS NOT "OTHERWISE QUALIFIED" BECAUSE SHE IS DISABLED IS CONTROLLED BY THIS COURT'S PENDING DECISION IN *CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORP.*	7
II. PETITIONER'S ASSERTION IN APRIL 1994 THAT SHE WAS TOTALLY DISABLED IS NOT DISPOSITIVE OF HER CLAIM THAT SHE IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE REHABILITATION ACT AND THEREFORE ENTITLED TO REASONABLE ACCOMMODATION OF HER CONDITION	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Cleveland v. Policy Management Systems Corp. (U.S. No. 97-1008)	7
Johnson v. Oregon, 141 F.3d 1210 (9th Cir. 1998)	7
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	3
Rascon v. US West Communications, Inc., 143 F.3d 1324 (10th Cir. 1998)	7
Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997)	8
Regulations	
29 C.F.R. § 1614.203(g) (1994)	10
Statutes	
5 U.S.C. § 8101	8
5 U.S.C. § 8102(a)	8

IN THE

Supreme Court of the United States

No. ———

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

RODNEY E. SLATER, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deborah Katz Pueschel, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 18, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is unreported. The decision of the district court (Appendix B), issued from the bench, also is unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on February 18, 1999. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 501(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791(b), provides in pertinent part:

> Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicappd employees are being met. . . .

Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. § 1614.203 (1994), provide in pertinent part:

> (a)(6) "Qualified individual with handicaps" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:
>
> > (i) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or
> >
> > (ii) meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.
>
> * * * *

(g) *Reassignment.* When a non-probationary employee becomes unable the essential functions of her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. § 8337 or 5 U.S.C. § 8451. . . .

STATEMENT OF THE CASE

At all times relevant to this case, petitioner was an Air Traffic Controller at the Washington Air Route Traffic Control Center, in Leesburg, Virginia, outside Washington, D.C. Petitioner's employer was the Federal Aviation Administration (FAA), an agency of the United States Government.

Petitioner was one of the first female Air Traffic Controllers at Leesburg. In 1979, she alleged that she had been the victim of a sustained pattern of sexual harassment by her male supervisors and colleagues. The United States Court of Appeals upheld her claim, holding that the sexually abusive language to which petitioner repeatedly had been subjected constituted a sexually hostile working environment. *Katz v. Dole,* 709 F.2d 251 (4th Cir. 1983).

The period following the court of appeals' decision was marked by continued hostility directed against petitioner at Leesburg, and she began to suffer physically. Over the years, petitioner has been diagnosed with asthma, sarcoidosis, pitting edema, and fibromyalgia. She nevertheless continued to work and uniformly received fully satisfactory performance evaluations.

In 1991, petitioner began to suffer from fatigue and edema; at the advice of the Mayo Clinic she consulted with an internist, who prescribed a fixed shift, 6 a.m. to 4 p.m. The FAA approved that shift, and petitioner remained on it through April 1994.

In late 1993, petitioner's supervisors and colleagues decided that her shift would be changed in two significant ways. First, instead of 6 a.m. to 4 p.m., her shift would be 8 a.m. to 6 p.m. This would have the effect of increasing the periods of heavy traffic for which petitioner would be responsible; the resulting increased stress on her was inconsistent with her treatment. The second change was to impose a Monday through Friday work week on petitioner, rather than the Wednesday through Sunday week she had previously been granted. Because traffic in the Washington area is lighter on weekends, this change would also have the effect of increasing traffic and stress.

Petitioner appealed to the FAA to allow her to retain the shift which enabled her to work, but the FAA refused. Faced with the prospect of having to work at a shift her doctors had told her would not be good for her, on April 5, 1994 petitioner broke down and left the facility.[1] She subsequently presented the FAA with an April 6, 1994 note from her doctor that said, "Due to physical and mental problems at the patient's employment, she is not

---

[1] According to the court of appeals, petitioner suffered a "stress-related episode", which required her to leave work. App. A at 2a.

released for any work at this time and until further notice". App. G at 34a. In November 1995, petitioner's doctor modified his recommendation to state that petitioner was "disqualified . . . for an active position as an air traffic controller". *Id.* at 32a. In June 1997, when deposed in connection with this case, petitioner's doctor testified that petitioner was "capable of administrative work in any capacity". App. E at 31a.

Petitioner timely initiated an administrative complaint of discrimination in which she claimed, *inter alia*, that the FAA violated her rights under the Rehabilitation Act by failing to continue her special shift as an accommodation of her disabilities. When the FAA rejected the complaint, petitioner initiated the instant action.[3]

The district court granted summary judgment for respondent. With respect to petitioner's claim under the Rehabilitation Act, the district court held that petitioner "was not qualified for the position" based upon her doctor's statement in April 1994. App. B at 17a. The court noted that petitioner had filed a claim for disability benefits with the OWCP, and cited the apparent contradiction between her claim that she was disabled and her assertion under the Rehabilitation Act that she could work with accommodation, admonishing that "she can't have it both ways. That's not right". *Id.*

---

2 Petitioner did not return to work under the conditions imposed upon her by the FAA, and she filed a claim for disability compensation with the federal Office of Worker Compensation Programs (OWCP), U.S. Department of Labor. On September 23, 1998, OWCP ruled that petitioner's absence from work after April 5, 1994 was due to disability caused by her employment. App. D at 27a.

3 Petitioner initially filed this action in the United States District Court for the District of Columbia. That court transferred to the case to the Eastern District of Virginia in 1997.

With respect to the change in petitioner's shift imposed by the FAA, the district court found that the new shift was "reasonable". *Id.* at 17a. While citing the testimony of one of petitioner's doctors that the two-hour difference in the shift appeared inconsequential, the district court ignored the testimony of petitioner's other doctor that petitioner's fibromyalgia "is worse with stress . . . [and] anything that increased stress would be more hazardous." App. E at 30a.

Petitioner appealed the grant of summary judgment to the Fourth Circuit, which affirmed the district court. With respect to petitioner's Rehabilitation Act claim, the court of appeals held as follows:

> It is uncontradicted that Pueschel's physician wrote on April 6, 1994 that until further notice, Pueschel's medical condition precluded her from working. Pueschel has not worked for the FAA since April 5, 1994, and has not provided the FAA with notice of her availability to work. The evidence establishes that at the time Pueschel brought the action and throughout the litigation, her illness precluded her from working as an Air Traffic Controller. Consequently, the Rehabilitation Act imposes no liability on the Department of Transportation. In short, she is not "otherwise qualified for employment." *DOE v. Univ. of MD. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); 29 C.F.R. § 1614.203(a)(6).

App. A at 5a.

Petitioner has timely petitioned for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT PETITIONER IS NOT "OTHERWISE QUALIFIED" BECAUSE SHE IS DISABLED IS CONTROLLED BY THIS COURT'S PENDING DECISION IN *CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORP.*

The court of appeals held that petitioner is not entitled to the protections of the Rehabilitation Act because "her illness precluded her from working as an air traffic controller". App. A at 5a. The validity of that holding will be controlled by the Court's pending decision in *Cleveland v. Policy Management Systems Corp.* (No. 97-1008), which has been argued but not yet issued as of the date of this Petition.

The first question in *Cleveland* is whether an employee's application for disability benefits under the Social Security Act creates a rebuttable presumption that the employee is judicially estopped from claiming that she is a "qualified individual with a disability" under the Americans with Disabilities Act.[4]

The majority of courts of appeals have rejected the presumption that an employee's assertion of a disability under a benefits statute estops her from simultaneously claiming the protection of the ADA. *See, e.g., Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1330-32 (10th Cir. 1998); *Johnson v. Oregon*, 141 F.3d 1210, 1212 (9th Cir. 1998). These courts have recognized that the standards utilized by employment and benefits statutes

---

[4] The second quesion in *Cleveland*, discussed *infra*, is, in the event a presumption is not created, the weight (if any) to be given to the employee's statements on the application regarding her disability if she also claims to the employer that she is a "qualified individual with a disability".

are different, and findings under one are not conclusive as to the other. *See Weigel v. Target Stores*, 122 F.3d 461, 468 (7th Cir. 1997) (claims for disability benefits under SSA are not "conclusive as to the ADA" qualification issue).

The identical reasoning applies in this case. The district court found that petitioner could not be "qualified" under the Rehabilitation Act because she had applied for disability benefits with OWCP.[5] According to the district court, petitioner "can't have it both ways. That's not right." App. B at 17a. The court of appeals did not reject that finding.

In fact, petitioner is permitted to argue to the OWCP that she is disabled because of factors related to her employment, while at the same time argue to her employer that she can work if her disability is accommodated. Indeed, the OWCP anticipated the argument and instructed petitioner to ask respondent "whether light or limited duty work is available" or "whether [her] usual job can be changed to meet [her] work limitations due to the injury". App. C at 21a. Thus, not only is petitioner not estopped from arguing that she is "otherwise qualified" to perform her duties, she is *required* to seek accommodation in the form of a modification of her duties in order to retain her eligibility for disability benefits.[6]

---

[5] The Department of Labor's OWCP administers the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.* The purpose of the Act is to provide for "compensation . . . for the disability or death of a [federal] employee resulting from personal injury sustained while in the performance of his duty". *Id.* § 8102(a).

[6] Petitioner's request that she be permitted to retain her special shift in 1993 satisfied her obligation under both Acts. In any event, respondent never offered petitioner any "light or limited duty work", or any work she could perform.

In the event the Court holds in *Cleveland* that an employee's assertion of disability under a benefits statute does not estop her from arguing to her employer that she is capable of working with reasonable accommodation, the decision below should be reversed and the case remanded for further consideration.

II. PETITIONER'S ASSERTION IN APRIL 1994 THAT SHE WAS TOTALLY DISABLED IS NOT DISPOSITIVE OF HER CLAIM THAT SHE IS A "QUALIFIED INDIVIDUAL WITH A DISABLILTY" UNDER THE REHABILITATION ACT AND THEREFORE ENTITLED TO REASONABLE ACCOMMODATION OF HER CONDITION.

It is undisputed that on April 5, 1994, when petitioner learned that respondent was altering her shift in a manner inconsistent with her doctors' advice, petitioner suffered a "stress-related episode", App. A at 2a, and left work. The next day, petitioner submitted a note from her doctor stating that "due to physical and mental problems at her place of employment", petitioner was not capable of performing any work. App. G at 34a. Based on this statement, both the district court, App. B at 17a, and the court of appeals, App. A at 5a, held that petitioner could not claim the protection of the Rehabilitation Act because she is not "otherwise qualified" to work.

That holding will also be controlled by the pending decision in *Cleveland*. The court of appeals' decision in *Cleveland* held that the employee's statements in her application that she was totally disabled were dispositive of her subsequent assertion that she was qualified under the ADA and capable of working. The validity of that holding is one of the questions to be decided in *Cleveland*. For the same reasons that an employee's *application* for disability benefits cannot control her entitlement to relief

under the Rehabilitation Act or ADA, the employee's *statements* in support of her application cannot be dispositive of her status under those Acts.

This is particularly true in this case because the medical evidence cited by both the district court and the court of appeals demonstrated that the Rehabilitation Act applied to petitioner. While it is true that in April 1994, petitioner's doctor advised respondent that petitioner could not work at "any" job with respondent because of her "physical and mental condition", App. G at 34a, in November 1995, petitioner's doctor advised respondent that his limitation on petitioner's employment then extended only to her service in "an active position as an air traffic controller". *Id.* at 32a. Moreover, at his deposition in June 1997, cited to the district court and the court of appeals, the doctor testified in response to questioning by respondent that petitioner was fully capable of working in an administrative capacity. App. E at 31a.

The court of appeals erred when it relied on the doctor's assertion that petitioner could not work as an air traffic controller as dispositive of her entitlement to the protections of the Rehabilitation Act. The regulations of the Equal Employment Opportunity Commission require federal agencies to "offer to reassign" an employee to a position she can perform if she "becomes unable to perform the essential functions of her position even with reasonable accommodation". 29 C.F.R. § 1614.203(g).[7] It is hard to reconcile the court of appeals' finding that respondent cannot be liable under the Rehabilitation Act, with respondent's clear failure to comply with the Act's

---

[7] This requirement is fully consistent with OWCP's requirement that the employer of a disabled federal employee "consider light or limited duty work". App. C at 21a.

requirement that it attempt to reassign petitioner to a position she could perform.

CONCLUSION

Petitioner requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

GEORGE M. CHUZI
(Counsel of Record)
KALIJARVI, CHUZI & NEWMAN, P.C.
1730 K Street, N.W.
Suite 1011
Washington, DC 20006
(202) 331-9260
Counsel for Petitioner